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869018—50——1

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 337

RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CITY OF NEW ORLEANS, LOUISIANA, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the specially constituted district court (R. 69) is reported in 84 F. Supp. 178. The report of the Interstate Commerce Commission (R. 10) is published in 267 I. C. C. 763.

QUESTION PRESENTED

The single question presented is whether the three-judge district court correctly ruled that

the Commission was right in holding, as matter of law, that the fair and equitable arrangement contemplated by Section 5 (2) (f) of the Interstate Commerce Act is measured by the specifications therein of a protective period of four years from the effective date of its order approving a transaction within the scope of Section 5 (2) of the Act.

STATUTE INVOLVED

The pertinent statutory provisions are set forth in Appendix A to this brief.

STATEMENT

In the *New Orleans Union Passenger Terminal case*, 267 I. C. C. 763, the Commission approved and granted, April 7, 1948 (by order to become effective 40 days thereafter) the joint application of railroads serving New Orleans (including the belt line railroad owned and operated by the city) for authority to construct and acquire certain lines of railroad, to jointly own or use lines of railroad, and to abandon certain other lines or operations on such lines—all as necessary incidents to the construction of a new railroad passenger terminal at New Orleans and the removal within that city of certain trackage for the purposes of eliminating grade crossings. As conditions upon which its approval of the carrier transactions was given, the Commission, in compliance with Section 5 (2) (f) of the Interstate

Commerce Act, prescribed arrangements for the protection of employees affected (see Exhibit B to complaint, R. 43–48) in language as follows (Exhibit A, R. 32–33):

> We are of opinion that a fair and equitable arrangement for protecting the interests of employees adversely affected by the applicants' proposals here will be provided by conditions similar to conditions (4) to (9), inclusive, imposed by us in *Oklahoma Ry. Co. Trustees Abandonment,* 257 I. C. C. 177 (197–201), which are similar to those prescribed in *Chicago, B. & Q. R. Co. abandonment, supra,* and our approval and authorization herein will be granted subject to those conditions.

"The total number of employees on the New Orleans lines that probably would be affected by the contemplated changes in operations," the Commission said (R. 27), "has been estimated by a committee of transportation officers, on the basis of present-day conditions, at 1,022, and the number required to operate and maintain the union passenger terminal has been estimated at 680. As provided in the terminal agreement, so far as feasible the terminal manager will recruit the necessary personnel from supervisory and other employees displaced at the 5 separate stations to be abandoned on completion of the union passenger terminal. The estimates indicate a net displacement of about 350 employees, of whom 9

are bridge tenders and about 108 are crossing watchmen now employed on tracks which will be retired or over which train and yard movements will be reduced; but the opinion is expressed that the number eventually displaced will not exceed 300."

In granting applications under section 1 (18)–(20) of the Act for permission to abandon railroad lines, the Commission has discretionary authority whether or not to impose conditions for the protection of labor. *Int. Com. Comm.* v. *Railway Labor Executives' Assn.*, 315 U. S. 373. But when granting applications for consolidation, merger, or other coordination of railroad properties or operation under section 5 (2) of the Act, the Commission is not left with discretion but is required to impose such conditions for a protective period of four years from the effective date of the Commission's order approving the carriers' applications. Section 5 (2) (f). Although the New Orleans project involved abandonments, its consummation required the coordination of railroad facilities and operation. The railroads contended, however, that whether employee protection should be afforded under section 5 (2) (f) or under section 1 (20) it was not appropriate to include grade-crossing watchmen and bridge tenders, because such employees will lose their employment, not because of coordination of railroad facilities and operation, but because of elimination of grade crossings, or as a result of

filling in New Basin Canal, in the exercise of the city's police power; and in this connection they asked the Commission to find that the loss of employment by those employees would not be the result of coordination of rail facilities and operations, but of the highway traffic improvement program engrafted on the union terminal project (R. 31–32). In answer appellant Railway Labor Executives' Association, intervener in the proceeding, pointed out that the project was presented as an inseparable unit; that the general plan for rerouting railroad traffic involved elimination of the grade crossings and consequent elimination of the crossing watchmen's jobs; and that, since the plan was to be consummated by coordination of railroad facilities and operation, employee protection under section 5 (2) (f) was mandatory (R. 32). Referring to the railroads' said contention and the intervener's answer, the Commission said (R. 32):

> * * * We imposed conditions under section 5 (2) (f) for the protection of employees adversely affected by a proposed abandonment, because abandonment and construction were component parts of an inseparable plan of operation, in *Texas & P. Ry. Co. Operation,* 247 I. C. C. 285.
>
> Our authority to impose conditions for the protection of employees in abandonment proceedings is discretionary, but imposition of such conditions in proceedings under section 5 (2) is mandatory. In this

> proceeding the proposals to abandon and the proposals within the scope of section 5 (2) are inseparable parts of a general plan for coordination of operation. Accordingly, we think that the conditions to be imposed by us herein should conform to the requirements of section 5 (2) (f).

Although section 5 (2) (f) provides for a definite period of employee protection, namely, four years from the effective date of the Commission's order approving the carrier transactions, the intervener contended that this provision simply fixed the minimum period of protection, leaving the Commission with discretion to extend the period where in its judgment it was equitable to do so. In this connection it urged that, since it was estimated that physical consummation of the project would require four or five years, the protection afforded by the Commission should continue for a period of at least four years from the time employees were adversely affected, and that such protection should extend to all employees so affected (R. 28). Section 5 (2) (f) of the Act provides as follows:

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall in-

clude terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Referring to the intervener's contentions that the four-year period specified in the above simply fixed the minimum period of employee protection, leaving the Commission with discretion to extend such period, and that, in the present case, the protection afforded should continue for at least four years from the time employees were adversely affected, the Commission said in its report (Ex. A to Complaint, pp. 12–13):

> The intervener urges that the intention of section 5 (2) (f) is to provide a period of readjustment for employees adversely

affected, and that no such period is afforded by merely serving notice now that a specified number of employees, without any identification, will be no longer needed 4 or 5 years hence. It therefore maintains that the purpose of the statute can be served only by dating any protective measures from the time when adverse effects of the project on employees become manifest, and that its proposal that employees receive protection for 4 years after completion of the project and after the date of adverse effect on them is not contrary to the provisions of section 5 (2) (f), which, the intervener submits, establishes the minimum, and not the maximum, period of protection.

In this connection the intervener refers to our determination in *Chicago, M., St. P. & P. R. Co., Trustees Construction*, 257 I. C. C. 292, wherein the Commission denied a petition for extension of the date of commencement of the protective period for adversely affected employees, saying:

"Section 5 (2) (f) prescribed a definite period of protection, namely, 'four years from the effective date of such order.' In our opinion, we have no authority to prescribe any other period in a case arising under section 5 (2)."

The intervener contends that conclusion should be reconsidered, pointing out that in *Chicago, R. I. & G. Ry. Co. Trustees Lease*, 230 I. C. C. 181, and 233 I. C. C. 21, decided prior to the enactment of section 5 (2) (f),

we approved and authorized a lease subject to certain conditions for the protection of employees, with a period of protection to run from the time when operation under the lease was to begin. It argues that, while section 5 (2) (f) makes employee protection mandatory, rather than discretionary, as before, there was no intention thereby to decrease the measure of protection theretofore available.

Finally, the intervener undertakes to distinguish, in scope, the general directive in the first sentence of section 5 (2) (f) from the specification, in the following sentence, of the terms and conditions which we are to include in our orders under section 5 (2), contending that the general directive and the specification of terms and conditions are of equal weight, and that if the specification is considered as fixing the minimum period of protection, the general provision is nullified. It urges that an arrangement cannot be considered fair and equitable protection to employees when its effect would be to deprive them of all protection.

Following the above, the Commission first referred to the railroad's anticipation, or assumption, that, in prescribing labor protective conditions, it would follow the practice it followed in cases in which it was unable at the time of decision to determine whether any employees would be affected, that is, that it would prescribe such

conditions in the language of the statute (see *Chicago & N. W. Ry. Merger,* 261 I. C. C. 672), that they urged, however, that it follow the pattern set in the *Burlington case,* 257 I. C. C. 700, by setting out detailed rather than general conditions (R. 31). Next the Commission discussed the railroad's contention, already described, that it should not include grade crossing watchmen or bridge tenders because the loss of employment by those men would result, not from coordination of railroad facilities, but from the City's highway program, calling for the elimination of grade crossings, by abandonments of lines and rerouting traffic. In answer, as above shown, the Commission (agreeing with intervener in this, R. 32) ruled against the contention, holding that such employees should be included in the employee protective arrangements prescribed as conditions in its order of authorization. Right following the Commission said (R. 32):

> As the record shows definitely that employees will be affected adversely by the applicants' proposals, it is appropriate in this case that we require a fair and equitable arrangement to protect the interests of employees so affected. We think that the benefit of such an arrangement necessarily must extend to all the railroad employees affected by exercise of the authorizations herein granted. But we also think that the fair and equitable arrangement contemplated by section 5 (2) (f) is meas-

ured by the specification therein of a protective period of 4 years from the effective date of our order approving a transaction within the scope of section 5 (2). As was decided in *Chicago, M., St. P. & P. R. Co. Trustees Construction, supra,* we have no authority to prescribe any other period.

As already mentioned (p. 2 supra), the order as entered by the Commission prescribed detailed conditions (similar to conditions (4) to (9) in the *Oklahoma Ry. case,* 257 I. C. C. 177), this being its practice where it definitely appeared at time of decision that employees would be adversely affected.

SUMMARY OF ARGUMENT

1. Contrary to appellant's contention, the statutory provision limiting the period of employee protection to 4 years from the effective date of the Commission's approval order does not simply fix 4 years as the minimum period, leaving the Commission free to extend and change the same to 4-year protective periods to commence when each employee is adversely affected by the transaction approved. The statute, after providing that as a condition of its approval under section 5 (2) of any transaction involving carriers by railroad, the Commission shall require a fair and equitable arrangement to protect the interests of employees affected, plainly sets, as the standard of fair and equitable employee protection, that,

for a period of 4 years from the effective date of the approval order, the transaction shall not result in the employees of the carriers affected by the order "being in a worse position with respect to their employment," the only qualification of this being the exception to the effect that, where an employee's employment prior to the effective date of the order has been for less than 4 years, then, the Commission, in the case of such employee, is not to require the protective period subsequent to such date to continue for a period any longer than that of the employee's prior employment. Since the exception limits even the length of the 4-year protective period, it necessarily follows that the period of 4 years from the effective date of the approval order is as long as the statute contemplates the Commission may provide for. Moreover, as further demonstrating that Congress did not intend that the Commission could liberalize the statute at will, it should not be put out of mind that the last clause of section 5 (2) (f) points the way Congress intended should be followed in situations where the statute's pattern of employee protection or the period is deemed unsatisfactory, in that there, by express provision, employees or carriers are left free to negotiate different arrangements. It cannot be attributed to Congress that it was without knowledge that there would be few transactions where the adverse effects to employees would follow at once

upon the effective date of the approval order or that there would be many where such adverse effects would be long deferred. An important purpose of section 5 (2) (f) is, as will be shown, to safeguard employees against sudden loss of employment, and, even though here the large majority of employees will not be adversely affected (bringing into play the protective arrangements) until after the 4-year period, nevertheless, for said period of 4 years they will have been and will be protected in their employment.

2. Contrary to appellant's contention, the employee protective *conditions* which the second sentence of section 5 (2) (f) directs the Commission to include in its order of approval are not distinct in type and extent from the fair and equitable employee protective arrangements which the first sentence provides that the Commission shall require as a *condition* of its approval of any transaction involving carriers by railroad. Appellant correctly states (Br. 12) that the specific type of protection required by the second sentence is "that an employee shall not be in a 'worse position' with respect to his employment," but this, of course, simply sets an administrative standard for the Commission's guidance, since the statute does not, itself, spell out the detail necessary to give effect thereto; and, accordingly, appellant's contention that the type of protection required by the second sen-

tence is distinct from that required by the first means that it is in effect arging that Congress has supplied two distinct and different administrative standards (in the matter of the type of employee protection) to guide the Commission in formulating an employee protective arrangement to be imposed as a condition to its approval or authorization of any transaction involving a carrier or carriers by railroad. Appellant contends (Br. 13) that said requirement, or standard, of the second sentence that employees are not to be placed in a worse position with respect to their employment and the other requirement of the sentence limiting the protective period to 4 years "constitute minimum requirements below which the Commission may not go in providing the fair and equitable arrangement required by the first sentence but beyond which it is free to act if the circumstances of a particular case require a more extended period." True, the standard that employees will not be placed in a worse position with respect to their employment, although one requiring full employee protection, still is a minimum requirement below which the Commission may not go in providing the fair and equitable arrangement required by the first sentence. But the emphasis placed by appellant on its being a minimum requirement implies that appellant considers that the Commission acting under authority of the first sentence (isolated

from the second) is empowered to formulate and prescribe a fair and equitable protective arrangement which would do more for the employees (Br. 27), placing them in a better position (than the present) with respect to their employment, and this, too, without limit in point of time imposed on the Commission (Br. 13). Doubtless this is not intended, but it serves to emphasize, if emphasis is necessary, that Congress has not supplied two distinct standards for administrative guidance, but that the fair and equitable employee protective arrangement required by the first sentence is the full employee protection set as a standard by the second, and that being so, that the Commission is not empowered to extend the protective period at will but is limited by the same standard to the 4-year period.

3. The legislative history definitely confirms what is plain on the face of the statute. As stated by appellant (Br. 34), section 49 of bill S. 2009 (March 30, 1939) dealt with the subject of unifications, consolidations, etc., and as passed by the Senate, contained a provision substantially the same as the first sentence of section 5 (2) (f) of the Act. The House bill, as reported by the House Committee, contained an identical provision, but, as passed by the House, the Harrington amendment was substituted, which as a practical matter would have precluded authorization of transactions under section 5 (2) that would

adversely affect employees. The Conference Committee met the situation by eliminating from the bill everything that bore on unifications, consolidations, etc., which action would have left the law as it was, that is, would have left the Commission's authority to impose employee protective conditions the same as it was when exercised by its report and order, sustained in *United States* v. *Lowden*, 308 U. S. 225. The Conference Committee's action, however, proved unsatisfactory and the bill was recommitted by the House to the conferees with instructions, among others, to insist upon a modified Harringfon amendment. The motion to recommit, passed by the House, contained a modified Harrington amendment, which, save for two exceptions, was practically the same as section 5 (2) (f) of the Act. One of the exceptions was that the Commission would have been required to prescribe the employee protective arrangements, not only as a prerequisite to its approval of consolidations, mergers, etc., but also as a prerequisite to its approval "of the substitution of another means of transportation for rail transportation proposed to be abandoned." (This exception was eliminated by the Conference Committee because deemed to be impracticable of proper administration.) The other exception was that the proposed modified Harrington amendment, in marked contrast to section 5 (2) (f) as enacted, contained no provision

limiting the time of the employee protection afforded. With the two exceptions described, however, the modified Harrington amendment was, as stated, practically the same as section 5 (2) (f), and the thing of importance to be noted is that, just as is done in section 5 (2) (f), said modified Harrington amendment consolidated the provision requiring that, as a prerequisite, or condition, to its approval of a carrier transaction, the Commission impose fair and equitable employee protective arrangements, with the succeeding provision directing the Commission to include in its order of approval terms and conditions "that such transaction will not result in employees * * * being in a worse position with respect to their employment."

As above stated, such standard ensuring employees against being in a worse position with respect to their employment is one of full employee protection, and it appears that that fact, particularly coupled with the fact that, as proposed, such full protection was unlimited in point of time, brought about strong opposition. For example, Chairman Lea of the House Conferees, speaking of the proposed modified Harrington amendment, said that the proposal to indefinitely place unemployed labor in a position no worse than when it ceased was fantastic. As a result of such opposition, changes were made embodying the provisions now in the statute,

limiting the protective period to 4 years from the effective date of the approval order subject to the further limitation as to employees whose employment prior to that date has been for a lesser period. And as so changed, together with certain further minor changes, the modified Harrington amendment was enacted into law as section 5 (2) (f) of the Act.

4. Further confirmation of the correctness of the District Court's decision is supplied by decision of the Commission rendered contemporaneously with the enactment of section 5 (2) (f), or shortly after, and since consistently adhered to.

ARGUMENT

1. Appellant's contention that the statute, instead of limiting the period of employee protection to 4 years from the effective date of the Commission's approval order, simply fixes the said 4 years as the minimum period of employee protection, leaving the Commission with discretion to extend the period in instances where it believes it would be equitable to do so, is erroneous

Although containing additional supporting argument, the brief filed by appellant adheres generally to its contentions as intervener before the Commission. As above shown, its first said contention is stated in the Commission's report as follows:

> The intervener urges that the intention of section 5 (2) (f) is to provide a period of readjustment for employees adversely

affected, and that no such period is afforded by merely serving notice now that a specified number of employees, without any identification, will be no longer needed 4 or 5 years hence. It therefore maintains that the purpose of the statute can be served only by dating any protective measures from the time when adverse effects of the project on employees become manifest, and that its proposal that employees receive protection for 4 years after completion of the project and after the date of adverse effect on them is not contrary to the provisions of section 5 (2) (f), which, the intervener submits, establishes the minimum and not the maximum, period of protection.

It would seem that, to attribute to the statute the purpose that its protective period, specified as four years from the effective date of the approval order, should be read instead as providing for, or permitting of, a protective period running for four years after the completion of the project and after the date of adverse effect on an employee, required considerable disregard of language and also distortion of any indicated purpose. True, here appellant, instead of continuing to treat the 4-year period as some limitation, asserts that it simply fixes a minimum of 4 years leaving the Commission free in cases where it deems equitable to further extend the time, but the effect of that is to urge that the Commission

is not restricted at all by the limiting provisions of the statute. Furthermore, while it may be that, in the instant case, the notice *now* afforded an employee is indefinite (Appellant's Br. 21), that is not to say that now it is no notice at all or that, as time goes on, it will not become definite and positive notice that his job is in jeopardy; nor is it to say that, in most of the many situations to which the statute applies, such notice, prior to the actual impact of adverse effects, is not from the start entirely effective and helpful to the employee. As will be later pointed out, the legislative history of section 5 (2) (f) shows that it is an important purpose of the provision to give "railroad workers protection against sudden dismissal." There is something not too convincing in argument that where an employee is put on notice that he will be no longer needed 4 or 5 years hence, he is hurt because he is assured of his job for those years instead of being at once dismissed with dismissal compensation while he searches for another. Appellant's argument assumes that immediate dismissal is the standard, whereas there are few cases in which that is so and it is obvious that there will be many where dismissal or other adverse effects will be long deferred and varying. It cannot be attributed to Congress, which has frequently dealt with section 5 transactions, that it was without knowledge of the varying situations.

Moreover, while for the most part dismissals will result from abandonments of lines or operations, the order does not provide, as alleged in the complaint (R. 5), that "no abandonment of lines or operations would be permitted until such construction was completed." Nor is the statement in the brief (19) as to this entirely sufficient. The order actually provides (R. 42) that "none of the lines or operations herein permitted to be abandoned may be abandoned until operation is substituted over lines herein authorized to be constructed, acquired, or jointly used or owned". Appellant asserts in its brief (p. 19) that the overwhelming majority of employees who will be adversely affected will not be so affected until after the employee protective period has expired. The Commission's report says (R. 27):

> The estimates indicate a net displacement of about 350 employees, of whom 9 are bridge tenders and about 108 are crossing watchmen now employed on tracks which will be retired or over which train and yard movements will be reduced; but the opinion is expressed that the number eventually displaced will not exceed 300.

Doubtless, for the most part the adverse effects upon employees will not result until after completion of the project, this particularly with respect to station employees. But the project is extensive, with many ramifications, including not only abandonments of lines to eliminate grade

crossings within the city but also other abandonments and numerous transactions for joint use and acquisition of lines and new construction of track, yards and lines. Plainly neither the Commission's order, nor the city and railroads' plan, contemplate that all abandonments or other important steps are to be deferred until after completion of the project.

Appellant's brief, while emphasizing that the question before the Commission and this Court was and is as to the proper interpretation of section 5 (2) (f), seems, at the same time, to urge that the Commission should have approached the question from the standpoint of what, in the circumstances, it would deem equitable and grant as a labor protective period. Probably this confusion results from appellant's view that the Commission is vested with discretion to extend indefinitely the protective period beyond the 4 years specified. But it serves to illustrate that the construction given the statute by appellant would ask the Commission to substitute its judgment for that of Congress.

Appellant asserts that its construction of the statute is shown to be correct both by the statute's language and its legislative history. But, so far as the language of section 5 (2) (f) is concerned, it plainly does not authorize the Commission to prescribe any protective period other than that "of four years from the effective date of" the Commission's order of approval, this being quali-

fied only by the exception to the effect that, where an employee's employment prior to the effective date of the order has been for less than 4 years, then, the Commission, in the case of such employee, is not to require the protective period subsequent to such date to continue for a period any longer than that of the employee's prior employment. Since the exception limits even the length of the 4-year protective period, it follows, it would seem, that the period of 4 years from the effective date of the Commission's order of approval is as long as the statute contemplates may in any case be provided for, and, also that this may not be avoided by making the 4-year, or any, protective period run, not from the effective date of said order, but from the date each employee is adversely affected.

(a) The authority placed with the Commission, whether by the first, or the second, sentence of section 5 (2) (f), is of the same type or kind, namely, administrative

Appellant asserts (Br. 12) that the first sentence of section 5 (2) (f) vests discretion in the Commission to determine what will constitute a fair and equitable protection for employees; that the provision makes mandatory a fair and equitable arrangement but leaves with the Commission discretion to determine the nature and extent in time of the particular type of protection to be afforded; and it further asserts:

> The second sentence does not provide the standards for the first sentence as held by

the District Court, but provides specific protection both of type and extent which the Commission is required to impose. The specific type of protection is that the employee shall not be in a "worse position" with respect to his employment, and the extent in time this type of protection is required is four years from the effective date of the Commission's order, with a proviso that a longer period shall not be required than the period during which the employee was in the service of the carrier prior to the effective date of the Commission's order.

For the convenience of the Court the provisions of section 5 (2) (f) are again set forth as follows:

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required

to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

The authority placed with the Commission, whether by the first or the second sentence of section 5 (2) (f), is of the same type or kind, namely, administrative. Although the second sentence, as a guide to the Commission's administrative judgment in arriving at the fair and equitable arrangements, terms, and conditions referred to, establishes the broad standard that the carrier transaction approved shall not result in employees *being in a worse position with respect to their employment,* and also fixes the protective period as 4 years from the effective date of the approval order, the sentence plainly does not provide a specific type of protection, not left to the Commission's discretion but made statutory. That is to say, the sentence can hardly be said to spell out and thus make statutory the precise protection to be thereunder afforded. It makes statutory the 4-year protective period

specified; but, as stated, the provision against employees being placed in a worse position with respect to their employment sets up a broad administrative standard for the Commission's general guidance in arriving at the fair and equitable protective arrangements or conditions. The standard of protection is obviously high but the arrangements giving effect thereto are nevertheless not spelled out but, similarly as in the case of other administrative standards, are left for the detailed carrying out to the Commission's experienced judgment.

As shown in *Chicago & N. W. Ry. Co. Merger*, 261 I. C. C. 672, 675, there are three classes of cases which arise under section 5 (2) (f): (1) cases in which it is definitely shown that no employees will be affected by the carrier transaction proposed; (2) cases in which it is not definitely shown that employees will not be affected; and (3) cases (such as the case here) where it appears that employees will be affected. In the first two classes of cases the Commission imposes conditions in the language of the statute, that is (as shown in the said merger case), it makes its approval of the carrier transaction

> Subject to the conditions that—
>
> During the period of 4 years from the effective date of our order herein such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse

position with respect to their employment * * *. (See p. 675.)

Since, in the first two classes of cases, adverse effects on employees are remote, this form of condition in the language of the statute is regarded as adequate. Nevertheless, in the event that such adverse effects should result, it is apparent that the language of the statute would have to be implemented by detailed conditions or arrangements such as, or similar to, those set forth in Exhibit B to the complaint. Said language, it can readily be seen, does not itself spell out with such degree of certainty as to make statutory any particular arrangements, terms, and conditions. On the contrary, the fact that the statute directs the Commission to include in its order of approval conditions that such transaction will not result in employees being in a worse position with respect to their employment affirmatively shows that such ensuring of employees against being placed in a worse position with respect to their employment is an administrative standard for the Commission's guidance in formulating and prescribing the employee protective conditions or arrangements. In short, in the two classes of cases in which the Commission imposes labor protective conditions simply in the language of the statute, that language, if occasion arose, would still have to be implemented by detailed conditions or arrangements. And, of

course, in the class-3 cases—the cases (such as the case here) in which it is shown that employees will be affected—the Commission has always treated the language as an administrative standard, in that it has prescribed in detail and along with its order the conditions or arrangements which in its judgment gave effect thereto. *Chicago & N. W. Merger Case, supra,* p. 675; *Oklahoma Ry. Co. Trustees Abandonment,* 257 I. C. C. 177. 197-201; *Chicago, B. & Q. R. Co. Abandonment,* 257 I. C. C. 700; *Texas & P. Ry. Operation,* 247 I. C. C. 285, 295, and others.

Appellant's theory is, it may be, that with both the type of protection under the second sentence, as well as the protective period, regarded as statutory and fixed by Congress, then it is more readily possible to treat the Commission's authority under the first sentence of section 5 (2) (f) as a distinct and separate thing and, therefore, not governed by the 4-year protective period specified, with which, of course, appellant's argument is chiefly concerned. But, it is not necessary to labor the question, for it is obviously not the fact that Congress itself has determined and spelled out in the statute the detail necessary to the protective measures and arrangement leaving nothing to the Commission's administrative discretion. Accordingly, accepting as it seems apparent is the case, that the language in the second sentence sets an adminis-

trative standard, then appellant's contention that it is distinct in type from the fair and equitable protection required in the first which it asserts places unlimited discretion wth the Commission, means that appellant is in effect urging that Congress has supplied two distinct and different administrative standards (in the matter of the type of employee protection) to guide the Commission in formulating an employee protective arrangement to be imposed as a condition to its approval or authorization of any transaction involving a carrier or carriers by railroad. Appellant contends (Br. 13) that said requirement, or standard, of the second sentence that employees are not to be placed in a worse position with respect to their employment and the other requirement of the sentence limiting the protective period to 4 years "constitute minimum requirements below which the Commission may not go in providing the fair and equitable arrangement required by the first sentence but beyond which it is free to act if the circumstances of a particular case require a more extended period." True, the standard that employees will not be placed in a worse position with respect to their employment, although one requiring full employee protection, still is a minimum requirement below which the Commission may not go in providing the fair and equitable arrangement required by the first sentence. But

the emphasis placed by appellant on its being a minimum requirement implies that appellant considers that the Commission acting under authority of the first sentence (isolated from the second) is empowered to formulate and prescribe a fair and equitable protective arrangement which would do more for the employees (Br. 27), placing them in a better position (than the present) with respect to their employment, and this, too, without limit in point of time imposed on the Commission (Br. 13). Doubtless this is not intended, but it serves to emphasize, if emphasis is necessary, that Congress has not supplied two distinct standards for administrative guidance, but that the fair and equitable employee protective arrangement required by the first sentence is the full employee protection set as a standard by the second, and that being so, that the Commission is not empowered to extend the protective period at will but is limited by the same standard to the 4-year period.

Surely any terms and conditions which, as expected by the second sentence, would ensure employees from being placed in a worse position with respect to their employment must be fair and equitable employee protection, at least if unlimited in point of time. And an examination of the protective arrangements prescribed by the Commission will show that the Commission has endeavored to ensure full employee protection

just as expected by the administrative standard laid down in the second sentence of the statute.

Appellant says that the Commission's construction of section 5 (2) (f) disregards the cardinal rule that the parts of a statute must be considered in relation to each other so that the whole may be given reasonable effect. The truth is that it is not appellant's construction but that of the Commission which, not only observes such cardinal rule, but gives to the statute a normal reading and construction. As demonstrating this, it will be seen that the first sentence of section 5 (2) (f) provides generally that, as a condition of its approval of a carrier transaction, the Commission shall require fair and equitable arrangements to protect the interests of employees affected. The second sentence lays down the standard to govern such equitable arrangements or conditions, providing, in effect, that they shall be such that the employees will not be placed in a worse position with respect to their employment—really full protection.[1] But it is

[1] If the provision in the first sentence requiring *fair and equitable arrangements to protect employees* stood alone, the Commission would have only that criterion for its guidance, but would, nevertheless, have to apply it to the best of its judgment. But the provisions of the first sentence do not stand alone, for, in the second, Congress has supplied a closer, although still broad and general, guide to the meaning it wants attributed to "the fair and equitable arrangements" to protect employees, namely, the standard that dur-

limited in point of time, namely, to 4 years from the effective date of the approval order. And then there is the last sentence of section 5 (2) (f) which might be termed a saving clause, permitting employees and carriers to iron out by agreement such situations as seem to them to require it. So that, the construction given the statute by the Commission does observe the cardinal rule of construction referred to by plaintiff. In fact, under that construction, each provision dovetails in purpose with the others and with the purpose of the provisions as a whole.

(b) Legislative history

All that has been just above said, is clearly borne out and confirmed by the legislative his-

---

ing the four-year period they are not to be in a worse position with respect to their employment.

Only in Section 5 (2) (f) of the I. C. Act and in Section 77 of the Bankruptcy Act (railroad reorganizations) has Congress used the criterion, or standard, "fair and equitable," to guide and govern the Commission's administrative judgment. As shown in *Securities Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, the phrase "fair and equitable" has judicial meanings attached to it, and, if the Agency purports to base its action on such judicial meanings alone, it must adhere to, and apply, them correctly (p. 88). But, as also shown in that decision, the phrase "fair and equitable," as used as a standard in an administrative statute, has its own meaning (p. 94), and the Agency may evolve criteria of fairness and equity to effectuate the legislative policy (p. 89) and apply them. Cf. *N. Y. Cent. Securities Co.* v. *U. S.*, 287 U. S. 12, 25. Surely, if an agency of Congress may do this, Congress itself may, as here, supply a closer guide to the meaning it wants attributed to "fair and equitable" than is afforded by the phrase itself.

tory of section 5 (2) (f) and particularly by the last stages thereof. As shown in the brief of the railroad interveners (pp. 14–16), the bill to amend section 5, as passed by the Senate, contained a provision practically the same as that in the first sentence of section 5 (2) (f). However, the House bill adopted the so-called Harrington amendment which as a practical matter would have precluded authorization of transactions under section 5 (2) that would adversely affect employees. The conference committee met the situation by eliminating from the bill everything that bore upon consolidations, mergers, etc., which action would have left the law as it was, that is, would have left the Commission's authority to impose protective terms and conditions the same as it was when exercised in *Chicago, R. I. & G. Ry. Trustees Lease,* 230 I. C. C. 181; 233 I. C. C. 21, sustained in *United States* v. *Lowden,* 308 U. S. 225. See 86th Cong. Rec. 5881. The Conference Committee's action, however, proved unsatisfactory, particularly to advocates of the Harrington amendment (86th Cong. Rec., p. 5869), and it was strongly urged by the heads of five brotherhoods that the bill be recommitted to the Conference Committee. In submitting the proposals of the latter, Chairman Lea of the House Committee said in part (86th Cong. Rec., App. 2865):

> The letter proceeded to advocate recommitment of the bill and support of the pro-

posal to be offered by the gentleman from New York (Mr. Wadsworth). * * *

* * * * *

Three main proposals as the ground of recommitment are suggested. The protection that Congress can legally and lawfully give to dismissed employees is confirmed by the authority of the Commission as decided by the Supreme Court.

The proposal to indefinitely place unemployed labor in a position no worse than when its employment ceased regardless of the length of service, the financial condition of the employer, or the need of employment is a fantastic proposal.

* * * * *

The House did recommit the bill to the conferees, May 9, 1940, with instructions, among others, to insist upon a modified Harrington amendment. The motion to recommit, passed by the House was offered by Congressman Wadsworth and read in part (86th Cong. Rec., p. 5886):

3. That the managers on the part of the House insist on the inclusion in the report of the committee of conference the provisions adopted by the House relating to combinations and consolidations of carriers (secs. 8 and 22 of the House amendment) but modified so that the sentence in section 8 which contains the provision known as the Harrington amendment, read as follows:

(f) As a prerequisite to its approval of any consolidation, merger, purchase, lease, operating contract, or acquisition of control, or any contract, agreement, or combination mentioned in this section, in respect to carriers by railroad subject to the provisions of part 1, and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order, or certificate, granting approval or authorization of any transaction referred to in this paragraph, the Commission shall include terms and conditions providing that such transaction will not result in employees of said carrier or carriers being in a worse position with respect to their employment.

Notwithstanding any other provision of this act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

It will be noted that the above proposed section 5 (2) (f) would have required the Commission to prescribe the employee protective arrangements, not only as a prerequisite to its approval of consolidations, mergers, etc., in respect of rail-

roads, but also as a prerequisite to its approval "of the substitution of another means of transportation for rail transportation proposed to be abandoned." Except for this, however, it is clear that the above section 5 (2) (f) which the House conferees were instructed to insist upon was practically the same as section 5 (2) (f) of the Act as it now stands enacted into law, save only that it contained no provision limiting the time of the employee protection afforded. The motion to recommit shows that the whole proposed section 5 (2) (f) including the first, as well as the second, sentence, was offered as a modified, or substitute, Harrington amendment. It was rejected by the Conference Committee in the particulars that it sought to provide employee protection unlimited in point of time and would have placed employees having short periods of employment on the same footing as others (86 Cong. Rec. 5869, see also Chairman Lea's statement above given); and the committee also omitted its provision which would have required the Commission to prescribe the protective arrangements as a prerequisite to approval "of the substitution of another means of transportation for rail transportation proposed to be abandoned." But, except for these changes the provisions of section 5 (2) (f), as recommended for adoption by the second Conference Committee report (and which were later enacted by Congress) were practically the same as those of the substitute Harrington

amendment which the House directed its conferees to insist upon. The Conference Report (Report 2832, pp. 68–69), following the setting out of the present section 5 (2) (f) which it recommended for adoption, contains the following statement:

> The substitute proposal for the Harrington amendment as recommended to the conferees by instruction of the House, provided in substance that in case of consolidations and other unifications involving carriers by railroads, the Commission should in its order of approval require fair and equitable arrangements to protect the interests of the railroad employees affected. This provision has been retained in the substitute amendment agreed upon in conference.
>
> The instruction of the House also made the provisions of the amendment applicable to the case where another means of transportation was substituted for rail transportation proposed to be abandoned. This provision is omitted from the substitute adopted in conference. A consideration of the application of this provision was, in the judgment of the conferees, found to be impracticable of proper administration.
>
> The conference agreement on the Harrington amendment includes a provision of this instruction which provides that the order of approval shall include terms and conditions providing that the transaction shall not result in the employees being in

> a worse position with respect to their employment. The conference agreement, however, qualifies this provision by confining its operation to a period of four years from the effective date of the order approving the transaction and providing further that the protection afforded to an employee shall not be required to continue for a longer period following the effective date of the order than the period for which such employee was in the employ of an affected carrier prior to the effective date of the order.
>
> In other words, the Harrington amendment made all employees of the affected carriers equal beneficiaries of its provisions regardless of the length of time they may have been employed prior to a consolidation. It also required the carrier to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. Under the terms of the conference agreement, the benefits to employees will be required to be paid for not longer than four years after the consolidation, and in no case for longer than the service of the employee for the affected carriers prior to the effective date of the order authorizing the consolidation.

Speaking of the above statement in the Conference Report, appellant's brief (pp. 47–48) says, in substance, that it is clear that in the minds of the conferees the first and second sentences were regarded as wholly distinct; that,

while the first sentence was mandatory in its requirement of an equitable arrangement for the protection of employees affected, it was discretionary in the sense that the nature and extent in time of the protection was left to the Commission to decide; that, on the other hand, the second sentence deals with a specific type of protection expressly stated by the conference report to be a separate provision. Such interpretation of section 5 (2) (f) has been above discussed (pp. 23–30). The paragraphs of the Conference Report hardly warrant plaintiff's statements and particularly the last paragraph directly refutes appellant's views, in that it shows that the conferees regarded the provisions of the substitute Harrington amendment as an inseparable whole, making all employees equal beneficiaries of its provisions and requiring the carriers to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. As above stated the House motion to recommit shows that the proposed section 5 (2) (f), including both its first and second sentences was, as a whole, offered as a substitute Harrington amendment. And further refuting appellant's contentions, Congressman Lea, chairman in charge, in explaining the bill on the floor of the House said (86 Cong. Rec., p. 10178):

> The substitute that we bring in here provides two additional things. First, there is a limitation on the operation of

> the Harrington amendment for 4 years from the effective date of the order of the Commission approving the consolidation. In other words, the employees have the protection against unemployment for 4 years, but the Commission is not required to give them benefits for any longer period. If the employees themselves make an agreement with the railroad company for a better or a longer period, that is a matter between the railroad men and the railroads, but this 4-year limitation is established by the pending conference agreement.

Although the Statute as enacted, the bill as finally placed before Congress and repeated statements of members make plain that the protective period means from the effective date of the order of approval, there is some argument to the contrary. In this connection the response of Chairman Lea to direct questions from Congressman Vorys are pertinent (Cong. Rec., Vol. 86, p. 10178, Aug. 12, 1940):

> Mr. VORYS of Ohio. Would this 4-year rule have the effect of delaying a consolidation for 4 years, or would it mean that if a consolidation were made there would still be a 4-year period during which the man would be paid?
>
> Mr. LEA. No; this rule does not delay consolidation. *It means from the effective date of the order of the Commission the benefits are available for 4 years. The*

order determines the date, and the protective benefits run 4 years from that date. * * * [Emphasis added.]

Also pertinent is the following from a report of the activities of the Brotherhood of Railroad Trainmen in connection with the legislation, published in 1940 under title "The Transportation Bill":

> President Whitney began the battle single-handedly, without the support of any of the other twenty standard railroad labor organizations. He caused the bill to be changed from one that permitted consolidations of the railroads, without public hearings and with no tangible protection to labor, to one that prohibits the Interstate Commerce Commission from approving any consolidations of railroads, without public hearings and unless they make a part of their order the positive requirement that no railroad worker will be placed in a worse position with respect to his employment, as a result of consolidation, *for a period of four years following approval by the Commission,* except that those employees who have less than four years of service shall receive protection for a period of time commensurate with their period of service. But even the employees who have a short period of service are enabled to lengthen that period of service during the consolidation proceedings, *as the protection period of the law begins on the date of final approval by the*

> *Commission.* In other words, if an employee has two years of service at the time the railroads make application for consolidation and there is a period of two years during which the consolidation procedure is before the I. C. C. and before final approval by the Commission, such employee would get the full protective period of the law. [Emphasis added.]

2. Decisions of the Commission

It is well settled that the construction contemporaneously given an administrative statute by the body charged with its administration is entitled to great weight. As early as *Texas & P. Ry. Co. Operation* (decided July 1941), 247 I. C. C. 285, the Commission treated the provision in the second sentence, directed against employees being placed in a worse position with respect to their employment, as a guide to, and as governing, the fair and equitable protective arrangements required by the first sentence (pp. 294–295) and always it has limited the protection afforded to a period not extending beyond 4 years from the effective date of its approval orders. See also *Oklahoma Ry. Co. Trustees Abondonment,* 257 I. C. C. 171, 198–201; *Chicago B. & Q. Ry. Abandonment,* 257 I. C. C. 700, 704–707; *Cleveland & P. R. Co. Purchase* (decided May 1941), 244 I. C. C. 793, 795–796. This latter is the earliest case under section 5 (2) (f) and

it is apparent that the Commission was governed by the same reading of the statute.

The carrier transactions which by section 5 (2) are subjected to the Commission approval are varied in kind and the situations that may be involved in each kind are also very varying. It must be assumed that Congress had these considerations in mind in providing for employee protection both as to type and in fixing the protective period, whereas appellant, to meet one particular situation, is asking that the statute be distorted and left uncertain as to all; that it be construed to provide for a sort of dual type of administration (not very clearly explained) and to authorize the Commission to change the 4-year period specified to protective periods commencing with the time each employee is adversely affected by the transaction. What might result from such a construction is illustrated by the contentions of the Railway Labor Executives' Association in *Chicago & N. W. Merger*, 261 I. C. C. 672, already discussed at pages 11 and 12, *supra*. There the Association, an intervener, in urging the Commission to impose conditions in the language of the statute, contended that, since the provisions of section 5 (2) (f) were mandatory, they required the Commission to impose conditions in every case "even though it may appear, as in this case, that at the time of the transaction no employees will be affected." And it, in effect, suggested

that "while adverse effects on employees cannot be foreseen at this time" still they might result in the unforeseeable future. There is enough truth in this suggestion to show, it would seem, that Congress proceeded on sound grounds in providing that the 4-year protective period run from the effective date of its approval order and not from the date of adverse effects on employees.

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

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JANUARY 1950.

APPENDIX A

Section 5 (2) of the Interstate Commerce Act

(54 Stat. L. 905, 49 U. S. C. § 5 (2))

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or

carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

BRIEF FOR THE RAILROAD INTERVENORS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 337.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Appellant*

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from the United States District Court for the District of Columbia.

BRIEF FOR THE RAILROAD INTERVENORS.

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OPINION BELOW.

The opinion of the court below (R. 69) is reported in 84 F. Supp. 178. The report of the Interstate Commerce Commission (R. 10) is published in 267 I. C. C. 763.

JURISDICTION.

The judgment and decree of the three-judge district court below was entered on June 17, 1949 (R. 72). Petition for appeal was presented and allowed on August 16, 1949 (R. 73-74). The jurisdiction of this Court is invoked under the provisions of Title 28, U. S. Code, Sections 1253 and

2101(b). Probable jurisdiction was noted on October 24, 1949 (R. 80).

COUNTERSTATEMENT OF QUESTION PRESENTED.

The single question presented for decision is whether the court below erred in ruling that the Interstate Commerce Commission was right in holding, as a matter of law, that the fair and equitable arrangement contemplated by Section 5(2)(f) of the Interstate Commerce Act is measured by the specifications therein of a protective period of four years from the effective date of its order approving a transaction within the scope of Section 5(2) of the Act.

STATUTE INVOLVED.

The statutory provision involved in this case is Section 5(2)(f) of the Interstate Commerce Act, 49 U. S. C. § 5(2)(f), which provides as follows:

> "(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

The provisions of Section 5(2) of the Interstate Commerce Act are also set out in full in Appendix A of this brief (pages 30-32).

STATEMENT OF THE CASE.

The statement of the facts and of the proceedings before the Interstate Commerce Commission and in the courts below set out in the appellant's brief (Bf. pp. 4-9) is substantially correct.

The first paragraph of the "Statement" in appellant's brief (Bf. p. 3), however, is argumentative and the statements made therein are not admitted by intervenors as sound in fact or law. The Commission did not impose conditions "purportedly for the protection of all employees dismissed and displaced", nor is it true that "only a few of the employees will receive any protection". (Bf. p. 3). On the contrary, the Commission imposed the conditions as the "fair and equitable arrangement contemplated by Section 5(2)(f)" and said that the "benefit of such an arrangement necessarily must extend to all the railroad employees affected by exercise of the authorization herein granted." (R. 32). The appellant by mistaking the nature of the conditions imposed is thus led to draw the improper and untrue conclusion that "only a few of the employees will receive any protection." (Bf. p. 3). As we will show, all the employees affected by the project authorized by the Commission will receive and already are enjoying the protection contemplated by the plain terms of the statute and the intent of Congress in passing the law to provide protection against sudden dismissal and long unemployment for a period of four years from the effective date of the Commission's order.

It should be pointed out that the parties who would be adversely affected if the appellant's contentions should be adopted by this Court are the City of New Orleans and the eleven railroad companies who are cooperating with the City in establishing a union passenger terminal in lieu of

the present five stations now in use and in eliminating many grade crossings within the City. These parties were the applicants in the proceedings before the Commission, and they have intervened in this case to support the order of the Commission as in the public interest and in no way contrary to the laws of the land. The position of these intervenors (hereafter sometimes called "railroad intervenors") is stated in their answer as follows:

> "In further answer to the allegations of Paragraph 14 of the complaint, railroad intervenors allege that the protective period of four years provided in the conditions pertaining to employees adversely affected does provide adequate and real protection to any and all employees who may be affected by the consummation of the projects as authorized by the Commission, all as required and provided by Section 5(2)(f) of the Interstate Commerce Act." (R. 58)

SUMMARY OF ARGUMENT.

The lower court and the Interstate Commerce Commission have correctly interpreted the governing statute in holding that the Commission is without power to impose protective conditions in an order approving a transaction under Section 5(2) of the Interstate Commerce Act for a period in excess of four years from the effective date of its order on the following grounds:

(a) The four year period of protection is prescribed by the clear and unambiguous language of Section 5(2)(f) of the Act.

(b) The legislative history confirms and fortifies this interpretation which the plain language of the statute demands.

(c) The time limitation imposed is fair and equitable and complies with the statutory mandate.

The interpretation urged by the appellant would not only be contrary to the clear language of the statute and the intent of Congress as shown by the legislative history, but

would also deny the carriers the fair and equitable arrangement assured them by Congress by extending the period of protection as high as eight, nine or more years. The Commission's order providing for a fixed period of protection of four years from the effective date of the order is completely fair and equitable and in full compliance with the mandate of the statute.

ARGUMENT.

I. The Four Year Period of Protection is Prescribed by the Clear and Unambiguous Language of Section 5(2)(f) of the Act.

Prior to the enactment of the Transportation Act of 1940, 54 Stat. 902, there was no statutory requirement that the Interstate Commerce Commission impose conditions for the protection of employees affected by a consolidation or unification of railroad facilities in any required order of approval under the Interstate Commerce Act. In such cases, it was a matter purely within the discretion of the Commission, to be determined incident to its consideration of what "just and reasonable" conditions were necessary to support a finding that the proposed consolidation "will promote the public interest". This Court so held in *United States* v. *Lowden*, 308 U. S. 225.* The Commission, however, was not at that time required to attach conditions for the protection of labor and in many cases did not do so. As is pointed out in the *Lowden* decision, Congress was at that very time (1939) considering bills which would have made it mandatory upon the Commission to impose conditions for the protection of labor in all orders approving transactions of this type.

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* The order sustained in the *Lowden Case* provided certain benefits for employees adversely affected by a lease, "for a period of five years from the commencement of operation under the said lease," *not* five years from the time an individual employee is adversely affected as is erroneously stated (Bf. p. 18) in the brief of appellant. See 230 I. C. C. 181, at 187.

After lengthy hearings and debate, Congress included in the Transportation Act of 1940, an entirely new provision amending Section 5 of the Interstate Commerce Act with respect to the consolidation and merger of carriers. Section 5(2) of the Act as so amended is set out in Appendix A hereto in full. In summary, it provides that it shall be lawful for two or more carriers to consolidate or merge their properties, or any part thereof, with the approval and authorization of the Commission. After a public hearing, the Commission is authorized to enter an order approving and authorizing such a transaction if it finds, subject to such terms and conditions as it shall find to be just and reasonable, that the transaction "will be consistent with the public interest". The section directs that the Commission give consideration to the effect of the transaction upon adequate transportation to the public, the effect upon the public interest of the inclusion or exclusion of other railroads in the territory, the total fixed charges to result, and the interest of the carrier employees affected. Section 5(2)(f) specifically provides for the protection of employees to be adversely affected as follows:

> "(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interest of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years *from the effective date of such order* such transaction will not result in employees of the carrier or carriers by railroad affected ~~by such order being in~~ a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions

of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." (Emphasis ours).

The lower court correctly stated the issues raised by the pleadings in this case when it said:

> "The issue here involved therefore concerns merely an interpretation of the provisions of Section 5(2)(f) of the Transportation Act. It does not involve the review of any discretion exercised by the Commission, as that body has held that 'the fair and equitable arrangement contemplated by Section 5(2)(f) is measured by the specifications therein of a protective period of four years from the effective date of our order approving the transaction within the scope of Section 5(2)(f).'" (R. 71).

This Court therefore is called upon to decide only whether the lower court erred in refusing to set aside the Commission's order, for reasons which it stated as follows:

> "In our view the language of the statute in question is clear and unambiguous and the Commission's interpretation is correct. The first sentence thereof provides that the Commission shall require fair and equitable arrangements to protect the interests of employees affected. The second sentence prescribes the standard for such arrangements, namely that they shall be such that the employees will not be placed in a worse position with respect to their employment, and then proceeds to limit the time of such protection, namely four years from the effective date of the approval order. In addition, this interpretation is in accordance with the Commission's prior construction of the statute, and on that account is entitled to great weight. Finally, the legislative history set forth by counsel for the defendants in their briefs is corroborative of the Commission's interpretation of the statute.

"We are therefore of the view that the motions for summary judgment filed by the defendants should be granted and the complaint should be dismissed." (R. 71-72).

Subparagraph (f) of Section 5(2) of the Interstate Commerce Act by clear and unambiguous language accomplishes the following with respect to all transactions covered by the section: *First*, it provides that the Commission must impose conditions on its approval which will provide a "fair and equitable arrangement to protect the interests of railroad employees affected". *Second*, it provides for the duration of such protection. *Third*, it permits such other protection as the parties might thereafter agree to.

The power of the Commission is discretionary insofar as the character of the conditions are concerned so long as they carry out the mandate that employees affected be not placed in a worse position for a period of four years from the effective date of the order but in no case for a longer period than the prior service of the employees before the effective date of the order.

Congress clearly required that the order *shall* include terms and conditions which provide protection for a period of four years from the effective date of the order. This mandatory requirement must appear in the order. Congress also required that the terms and conditions must nevertheless not give to employees a period of protection longer than the period of employment prior to the effective date of the order.

These provisions for time limitations can lead to only one conclusion and that is that Congress deliberately fixed the period of protection to start from the effective date of the order, not the date an employee is adversely affected. Thus, all employees are given up to four years, but not longer than their period of prior service (note that the statute prohibits the requirement of any protection whatsoever for employees hired after the effective date of the order), to readjust and overcome the expected effect of a

consolidation after they have been given fair notice through approval of the transaction by the Commission.

The Commission has followed this clear meaning of the statute consistently ever since the passage of the act in 1940, as is pointed out in its report in this case.* (R. 30-32). Indeed, this very same issue was raised by the appellant in the case of *Chicago, Milwaukee, St. Paul and Pacific R. Co., Trustees Construction*, 252 I. C. C. 49, 287 (1942) and 257 I. C. C. 292 (1944). On a reconsideration of the question by the full Commission, it was there said (257 I. C. C. 294):

> "Section 5(2)(f) prescribed a definite period of protection, namely, 'four years from the effective date of such order.' In our opinion, we have no authority to prescribe any other period in a case arising under Section 5(2)."

It would indeed take "compelling language in the statute itself" to warrant the rejection of the contemporaneous interpretation of the statute by the administrative agency charged with its execution, especially since it has now been consistently followed for a period of about seven years. *Maynard* v. *Elliott*, 283 U. S. 273, 277. See also *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116, and *Boutell* v. *Walling*, 327 U. S. 463, 470-471. Appellant has not shown any such compelling language in the statute as a reason for rejecting the Commission's interpretation of its powers and duties under the statute and thus disregarding the clear and unambiguous language used by Congress. In fact, the position of appellant can be sustained here only if the Court reads into the statute limiting words so that the prescribed period of four

* Appellant in its brief argues that the issue of the Commission's power was not contested in most of the cases, but it nevertheless remains true that the Commission has never prescribed the Washington Agreement Conditions since the passage of Section 5(2)(f), and has formulated an entirely different arrangement to assure the required protective arrangement along the lines of those prescribed in the order here under attack.

years from the effective date required in every order of the Commission becomes not a fixed four years, but a minimum of four years. Manifestly, the Court is not empowered to do this and so frustrate the clear intent of Congress as stated in unambiguous language.

Throughout appellant's brief, there is repeated over and over again a theme to the effect that "as the Commission and the lower court interpret Section 5(2)(f) however, the second sentence nullifies the first because the Commission claims it has no discretion but to follow the specifications of the second provision alone." (Bf. p. 13). A review of the fair arrangement prescribed by the Commission (R. 43-48) will refute that argument and theme, because it is apparent that in this case the detailed provisions of the arrangement go far beyond the bare requirements of the second sentence.

The arrangement prescribes in detail the manner in which payments are to be made to a displaced employee, that is one required to accept a less desirable job, so as to make him whole and protect his pension or annuity rights and seniority rights. It prescribes how dismissal allowances are to be calculated and paid to a dismissed employee. Moreover, the arrangement also provides for the preservation of existing rights such as free transportation, pensions, hospitalization, etc., reimbursement for moving expenses of displaced employees, reimbursement for losses with respect to sale or disposition of a home, and for the arbitration of any disputes with respect to the conditions providing for the protection of the employees. These conditions constitute the "fair and equitable arrangement" required by the first sentence of Section 5(2)(f).

The Commission then goes on to follow the clear mandate of Section 5(2)(f) by providing, in accordance with the second sentence, that the period during which the protection is to be given shall extend from the date on which the employee is adversely affected to the expiration of 4 years from the effective date of the order, provided, however,

that such protection is not to continue for a longer period following the effective date of the order than the period during which the employee was in the employ of the carriers prior to the effective date of the order. (R. 44) Thus, the fair arrangement gives full meaning and effect to the clear and unambiguous language of the statute by implementing both the first and second sentences of the statute which together form the mandate of Congress.

Although the appellant admits that the precise issue in this case has never before been considered by the courts, it refers in its brief to the decisions of this Court in *United States* v. *Lowden*, 308 U. S. 225 and *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U. S. 373, as interpreting the "*intent*" of Congress in enacting the provisions of Section 5(2)(f) contrary to that "urged" by the Commission. (Bf. p. 57). Neither of these cases considered the question of the duration of the protective period required by the 1940 amendments; and it is difficult indeed to find any language in the opinions even remotely relating to the issue now before the court.

In the *Lowden Case*, the Court had under consideration the power of the Commission to impose, in its discretion, conditions for the protection of labor in approving a consolidation under Section 5 of the Act as it existed prior to the 1940 amendments. The only reference the Court made in that decision to the legislative history here under consideration was to observe that Congress at the time of that decision was considering bills to make mandatory such provisions in consolidation orders of the Commission. Obviously, the Court could not have reached a conclusion as to Congress' intent months before the extensive debates were concluded and the law was enacted.

The second case, *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, was limited to the question of the power of the Commission to impose conditions for the protection of labor in abandonment cases under Section 1(18)-(20) of the Act. There it was contended

that Congress had ratified the Commission's construction of Section 1(18)-(20) as not giving it the power to provide such conditions when it failed to amend the law as recommended by the Commission. After holding it could not impute to Congress' failure to act any such significance, the Court said:

> "Nor is the petitioners' contention strengthened because Congress did modify § 5(4) in the Transportation Act of 1940. The modifications, so far as relevant here, merely made mandatory with respect to unifications the protections for workers that had previously been discretionary. See *United States* v. *Lowden*, *supra*, 239. To regard them as a restriction on the discretionary power of the Commission with respect to abandonments is not merely illogical. It requires us to impute to Congress a policy of mandatory protection for labor in unifications and no protection at all in abandonments. It is reasonable to suppose that if Congress had intended to make such a distinction, it would have said so more explicitly." (315 U. S. 373, 379)

There is nothing in this language to support the argument that Mr. Justice Black, in using the foregoing language, meant that Congress intended to set up two kinds of mandatory protective conditions when it enacted Section 5(2)(f). His language is perfectly clear. All he said was that Congress intended to make the protection mandatory and not discretionary as it had been in the past. No attempt was made to determine the character and duration of the protection that Congress made mandatory by the 1940 amendments. This was done by the Commission when it interpreted the statute in *Chicago, Milwaukee, St. Paul and Pacific R. Co. Construction*, *supra*, as is pointed out in its opinion in this case (R. 30), by following what we submit is the clear and unambiguous language of the statute.

II. The Legislative History Confirms and Fortifies the Interpretation Which the Plain Language of the Statute Demands.

In the preceding section of this brief we have shown that the language of Section 5(2)(f) is plain and unambiguous. Accordingly, resort to the legislative history of that provision is unnecessary. As said in *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 278:

> "But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed."

After thus rejecting the competency of legislative history to alter or vary the plain meaning of a statute, the Court in that case went on to refer to that history as corroborating the conclusion reached from the terms of the statute itself. In the present case, our attitude with regard to the use of the legislative history is based squarely on the reasoning in the decision just discussed. We think that Section 5(2)(f) is so clear as to need no extraneous aid to construction; but since its meaning has been called into question, we think it proper to invite attention to the legislative history to confirm and fortify the interpretation which the plain language of the statute demands and which the Commission and the court below have given it in the order now under review.

The legislative history begins with the year 1938 when the railroads in the United States unsuccessfully sought a reduction in the wages of their employees in a case that was submitted to an Emergency Board appointed by the President as provided in the Railway Labor Act. (45 U. S. C. §§ 151-188). As a result of the Emergency Board's recommendation, the President appointed a committee of six, consisting of three railroad officers, Messrs. Clement, Gray and

Norris, and three labor executives, Messrs. George M. Harrison, President of the Clerks, B. M. Jewell, representing the Shopmen, and D. B. Robertson, President of the Firemen, to confer and to make recommendations with respect to legislation which might improve the railroad situation.

This committee brought in a report bearing date of December 23, 1938, commonly known as the Committee of Six Report. The report, which was signed by all six members, and was later approved by an affirmative vote of all twenty of the Brotherhoods belonging to the appellant Railway Labor Executives' Association, recommended among other things a liberalization of the law with respect to consolidation, subject to the following condition:

> "*The interests of the employees affected.*
>
> The Board* shall examine into the probable results of the proposed consolidation and require as a prerequisite to its approval a fair and equitable arrangement to protect the interests of the said employees."

Thereafter, a bill was prepared to carry into effect the recommendations of the Committee of Six. This bill was introduced in the House by Representative Lea as H. R. 4862, 76th Cong., 1st Sess., providing in the section pertaining to consolidations:

> "The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected." (p. 148)——

A somewhat different bill, S. 2009, was introduced in the Senate by Senator Wheeler, but it contained the exact language quoted above with respect to protection to be required in the case of unifications. This provision remained unchanged when the bill passed the Senate on May 25, 1939.

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* The Committee of Six recommended that the Commission's jurisdiction over mergers and consolidations be transferred to a proposed Transportation Board. The entire report is reprinted on pages 257-308 of *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Cong., 1st Sess., on H. R. 2531 and H. R. 4862.*

The House Committee, after lengthy hearings, completely rewrote the Senate bill and reported a bill which, however, still contained the identical language quoted above with respect to labor protection, and which represented what had been agreed to between labor and management.

As passed by the House, however, the bill contained the so-called Harrington Amendment, which consisted of a proviso reading:

> "Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of a carrier or carriers or in the impairment of existing employment rights of said employees." *

It will be noted that the bill as passed by the Senate left the protection of labor entirely up to the discretion of the Commission so long as it provided a fair and equitable arrangement. On the other hand, the bill passed by the House (with the Harrington Amendment) in effect denied the Commission power to approve any transaction within the scope of Section 5(2) which would result in adverse effect to employees. To work out these widely divergent views as to the protection of employees affected by consolidations (and many other matters not pertinent here), the two bills were referred to a conference committee.

Representatives of the railroads and of the Railway Labor Executives' Association (appellant here) advised the conferees of their opposition to the Harrington Amendment, which was being vigorously championed by President Whitney of the Brotherhood of Railroad Trainmen. After extended consideration, the conferees decided unanimously that they would meet the situation by leaving out of the bill everything that bears upon the subject of consolidation. In the Conference Report's discussion of the subject it was said in part:

> "These omitted provisions as to consolidation included the Harrington amendment which was adopted

* Cong. Rec., Vol. 84, pp. 9881-2, July 24, 1939.

on the floor of the House. This amendment was adopted by the House as a protection against displacement of employees due to the consolidations that might result from the provisions of section 5. Employees had a fear of unemployment and to some extent communities feared the loss of transportation due to the possible consolidations under present circumstances where a revival of the transportation industry might show that such consolidations were unwarranted.

* * * * * * * * * *

"In any event the elimination of the consolidation provision from the bill obviates the necessity of guarding against the possible unemployment that might otherwise have resulted from these provisions."*

Although the report does not so state, the Conference Committee undoubtedly was influenced in reaching its conclusion by the fact that this Court decided that the Interstate Commerce Commission had the power to impose such conditions as it deemed necessary in the public interest to protect employees as a condition of approving a consolidation under old Section 5(4) of the Act, when the decision in *United States* v. *Lowden, supra,* was announced on December 4, 1939, while the bills were in conference.

The advocates of the Harrington Amendment, however, were not satisfied, and the House recommitted the bill to the conferees on May 9, 1940, with instructions, among others, to insist on a substitute Harrington Amendment. During reconsideration, Senator Wheeler sponsored a compromise providing that a period of four years be fixed as a protective period.

The Conference Committee adopted such a compromise, but carefully fixed the exact time the period was to begin running as the *effective date of the order.* In addition, it limited the period of protection to not to exceed the length of the prior service of each individual employee. It also

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* Report No. 2016, April 26, 1940, House of Representatives, 76th Congress, 3d Session.

adopted an amendment providing that the employees and carriers might in the future make agreements covering protection of labor notwithstanding the provisions of the statute. This latter provision shows that the conferees desired to leave open to the employees an opportunity to secure through negotiations protection for a longer period than that required by Congress.*

When the Second Conference Report was under discussion in the House, Representative Lea, Chairman in charge, said:

> "The substitute that we bring in here provides two additional things. First, there is a limitation on the operation of the Harrington amendment for 4 years from the effective date of the order of the Commission approving the consolidation. In other words, the employees have the protection against unemployment for 4 years, but the Commission is not required to give them benefits for any longer period. If the employees themselves make an agreement with the railroad company for a better or a longer period, that is a matter between the railroad men and the railroads, but this 4-year limitation is established by the pending conference agreement.
>
> "There is another limitation on the protective benefits afforded by the amendment. The benefit period shall not be required for a longer period than the prior employment of the employee before the consolidation occurred. In other words, under the original Harrington amendment, if a man was employed for 6 months, he would indefinitely be subject to the benefits of the amendment from the railroad company. We have changed that so the railroad company will not be required to maintain him in no worse condition as to his employment for any longer period than he worked before the consolidation occurred."**

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* See Report No. 2832, August 9, 1940, House of Representatives, 76th Congress, 3d Session.

** Cong. Rec., Vol. 86, p. 10178, August 12, 1940.

From this again, it is quite clear that the proponents of this bill intended to compromise the matter of the length of protection to be given labor by the Commission by specifying the period, leaving the parties free to negotiate a longer period if they desired to do so. If there were any doubt as to the time the four year period was to begin, Representative Lea removed it in the following colloquy with Mr. Vorys of Ohio:*

> "MR. VORYS of Ohio. Would this 4 year rule have the effect of delaying a consolidation for 4 years, or would it mean that if a consolidation were made there would still be a 4 year period during which the man would be paid.
>
> "MR. LEA: No; this rule does not delay consolidation. *It means from the effective date of the order of the Commission the benefits are available for 4 years. The order determines the date, and the protective benefits run 4 years from that date.* * * *" (Emphasis added).

On the same day Chairman Lea made it clear that the language of Section 5(2)(f) was not designed to assure every dismissed or displaced employee a bonus of four years' pay, but rather was to assure employment or pay for a definite four year period following notice that an approved transaction would adversely affect employees; that is, following the effective date of the Commission's order approving the transaction. He said:*

> "MR. O'CONNOR. As I want to see those who might lose their jobs as a result of consolidation protected I should like to have the gentleman's interpretation of the phrase that the employee will not be placed in a worse position with respect to his employment. Does 'worse position' as used mean that his compensation will be just the same for a period of 4 years, assuming that he were employed for 4 years, as it would if no consolidation were effected?"

* Cong. Rec., Vol. 86, p. 10178, August 12, 1940.

"MR. LEA. I take that to be the correct interpretation of those words. Our conference agreement followed the instructions of the House in that respect. It gives railway labor generous *protection against sudden and long unemployment.* * * *" (Emphasis added.)

The last sentence of Mr. Lea's answer contains an important clue to the true intent of Congress in passing the statute for it is apparent that the purpose, as expressed in the final form of the bill, was not to provide unlimited employment rights to the affected workers, but rather it was to give them reasonable notice of pending demotions or loss of their jobs and assure them full protection for a maximum period while they made readjustments or provisions for new employment. The prohibition expressed in Section 5(2)(f) is not against demotion, displacement or dismissal, but against the *sudden* impact thereof. The same thought was expressed by Representative Wolverton, a member of the Committee which reported the bill, when he said:*

"Now as to the Harrington amendment, the conferees have adopted practically the same language originally adopted by the House, *but with a modification as to the length of time the conditions are to be effective.* * * *

"* * * It was recognized that the real intent of the sponsors was to save railroad employees from being suddenly thrust out of employment as the result of any consolidation or merger entered into * * *.

"* * * Nor should anyone overlook the fact that the adoption of this amendment as agreed to by the conferees gives railroad workers *protection against sudden dismissal* * * *" (Emphasis added).

After further discussion not pertinent here the bill was passed by both houses and was signed by the President on September 18, 1940. It thus appears without doubt that Congress not only used clear and unambiguous language to

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* Cong. Rec., Vol. 86, p. 10189, August 12, 1940.

express the intent of the compromise arrangement to dispose of the issue of labor conditions to be imposed in cases of railroad consolidations, but the legislative history supports the view of the Interstate Commerce Commission in this case that it is required to impose an arrangement to be effective for the specified period of four years, but not longer than the prior service of each employee, from the effective date of its order, and that it had no power to prescribe a longer protective period.

In a lengthy report of the activities of the Brotherhood of Railroad Trainmen with respect to this legislation, published in 1940 under the title "The Transportation Bill", the result is described in full accord with the above discussion as follows:

> "President Whitney began the battle single-handedly, without the support of any of the other twenty standard railroad labor organizations. He caused the bill to be changed from one that permitted consolidations of the railroads, without public hearings and with no tangible protection to labor, to one that prohibits the Interstate Commerce Commission from approving any consolidations of railroads, without public hearings and unless they make a part of their order the positive requirement that no railroad worker will be placed in a worse position with respect to his employment, as a result of consolidation, *for a period of four years following approval by the Commission*, except that those employees who have less than four years of service shall receive protection for a period of time commensurate with their period of service. But even the employees who have a short period of service are enabled to lengthen that period of service during the consolidation proceedings, *as the protection period of the law begins on the date of final approval by the Commission*. In other words, if an employee has two years of service at the time the railroads make application for consolidation and there is a period of two years during which the consolidation procedure is before the I. C. C. and before final approval by the Commission, such employe would get the full protective period of the law." (Emphasis added.)

While it is difficult to understand how any conclusion can be reached from this legislative history other than that it fully confirms and fortifies the interpretations which the plain language of the statute demands and which the Commission has given it in the order under review, appellant has attempted in a lengthy argument to show that the first two sentences of the section should be considered separate and apart from each other and interpreted as providing two distinct types of protection. To support this ingenious theory, appellant seeks to show that the proponents had two absolutely different purposes in mind. But such is not the case.

Both conference committees recognized the complete divergence between the labor provisions of the Senate bill and those of the Harrington Amendment of the House bill. The first Conference Committee, as we have seen, saw no way out of the dilemma but to drop all amendments in the bill looking toward a liberalization of the law with respect to consolidations and all reference to protection of labor in consolidations. This left unchanged the existing law, under which, as decided in the *Lowden Case*, the protection of labor in consolidation cases was completely within the discretion of the Commission. This was not satisfactory to many members of the House, who apparently felt that such protection of labor was inadequate, and the bill was recommitted to the second conference committee. The second conference report recommended a compromise between the two extremes. It neither left the Commission with a wide discretion as to the duration of the fair and equitable arrangement to be imposed, nor gave the employees unlimited protection for all time. It specified the period during which the protection was to run and made it mandatory that the order provide that the arrangement protect the employee for a specific period of four years from the effective date of the order.

That this was the purpose of the compromise was clearly stated in the second conference report and amplified in de-

bate by Representatives Lea, Wolverton, Vorys and others as set out above. Appellant apparently overlooked these important statements when it said the debate in the House refutes ~~supports~~ the Commission's construction.

Appellant also apparently overlooked the last sentence of Section 5(2)(f) when it said (Bf., pp. 15-16) the entire legislative history is devoid of any suggestion that the measure of protection agreed to by the carriers and the unions was to be modified or nullified by the compromise agreement. It is clear beyond a doubt that Congress was not satisfied with the existing situation and desired to take the matter into its own hands and specify the character and duration of the protection that was to be mandatory in the case of future consolidations. If there were any doubt, the provision that the parties may make agreements *in the future* as to protective conditions can mean nothing else but that Congress was preempting the field and intended to supersede any arrangements theretofore existing.

III. The Time Limitation Imposed is Fair and Equitable and Complies With the Statutory Mandate.

Appellant admits that the order of the Commission complies with the requirements of Section 5(2)(f), but contends that such compliance is only with the "minimum" requirements of that section, and that the Commission, in the exercise of its discretion, can and should go further and provide that the protective period for each employee should continue for a period of four years after the date he is actually displaced or dismissed by the consolidation. Appellant argues that the Commission's order "will operate to deny all protection to those employees who will be adversely affected", since, by reason of the four-to-five year construction period, many employees will retain their jobs until completion of the new terminal and therefore would not receive any displacement or dismissal allowance under the protective conditions imposed. That argument, we submit, is completely fallacious. Section 5(2)(f) provides that the

employees shall not be "in a worse position with respect to their employment" for four years—*not* that each employee is guaranteed displacement or dismissal compensation for four years. Congress did not intend that an employee should receive a displacement or dismissal allowance unless he was actually placed in a "*worse position*" during the protective period. If he remained on his job during that period and thereby sustained no adverse effect, he would receive no displacement compensation; but he would, in fact, have been receiving protection by reason of his continued employment, or as Congressman Lea put it, "protection against sudden and long unemployment."

The unsoundness of the appellant's contention in this respect may be demonstrated by the following illustrations:

Assume that a consolidation may be made promptly after the effective date of the Commission's order. Employees A and B, with over four years prior employment, both have average earnings of $400.00 per month. Employee A is immediately displaced to another position in which he earns only $375.00 per month. Employee B is not displaced, and continues to earn $400.00 per month. Under the Commission's order, Employee A would receive a displacement allowance of $25.00 per month, and Employee B would receive no displacement allowance. Plaintiff's contention is that Employee A is receiving protection, but Employee B is not. Of course, both employees have been protected; both have been made whole or kept whole with respect to their earnings.

Assume a second case, in which a consolidation would result in the ultimate displacement of ten employees, two immediately after the effective date of the Commission's order approving the consolidation, two after the first year, two more at the end of the second year, two more at the end of the third year, and the last two upon completion of the consolidation at the end of the fourth year. In such a case, assuming that each of the displaced employees was unable to secure employment paying as much as his old position, the first two employees would receive displacement

compensation for the entire four-year period, following the effective date of the Commission's order; the second two would receive such compensation for only three years; the third set of employees for only two years; the fourth pair for one year; and the fifth pair would receive no displacement compensation whatsoever. However, all ten would be receiving the protection that Congress intended during the entire four-year period.

The second example given above is illustrative of the consolidation at hand. It is estimated that the New Orleans Union Passenger Terminal will not be completed for four or five years. However, work on the construction has already commenced. One of the first undertakings is to fill the New Basin Canal and thereby eliminate the need for certain bridge tenders (R. 16, 27). If they are unable to secure employment paying equivalent wages, they will begin receiving displacement allowances within a few months. One by one, grade crossings will be eliminated, obviating the need for one to three crossing watchmen at each such crossing. As each is displaced he will begin receiving displacement compensation if it is necessary to make him whole with respect to his earnings. Other employees will not be displaced until completion date, in 1952 or 1953. Each will have been protected under the Commission's order. But all will have received complete protection against sudden dismissal or displacement for a period of four years following the effective date of the Commission's order. Those dismissed or displaced within the period will have received a displacement or dismissal allowance. Those not adversely affected until 1952 or 1953 will have been fully protected by the enjoyment of four years of employment at full pay.

Appellant's contention is inconsistent with the exception found in the second sentence of Section 5(2)(f) which must be included in the order whereby no employee is entitled to protection in excess of the period he was employed prior to the effective date of the order. This already means that no new employee shall be entitled to any protec-

tion and that those with short periods prior to the date of the order for no longer time after the date of the order than their prior period of employment. Of course Congress intended to thus protect the railroads from undue penalties and to reduce the protection accordingly for these short term employees by limiting their protective period below the full four year period.

Take the example of two employees, one with five years service prior to the effective date of the order and the other with three years, who are both displaced four years after the date of the order. The three-year employee would receive no compensation because his three year protective period had expired under the provisions of the law limiting the protection to a period not longer than the employee's service prior to the effective date of the order. The five-year employee, however, under appellant's theory would not only have had no loss for the first four years, but would be entitled to four more years compensation, thus in effect receiving 8 years protection after the effective date of the order. Of course Congress could have intended no such discriminatory result. The only reasonable construction of the law would be that neither would receive compensation since both have been kept whole for the full period after the effective date of the order and have thus been protected against the impact of sudden dismissal.

These illustrations, coupled with the legislative history, show the fallacy in appellant's reasoning. There is nothing in the language of the statute or its legislative history to indicate that Congress intended to leave the maximum period of protection to the discretion of the Commission. The whole legislative history shows that Congress found it necessary to fix a definite and prescribed period for keeping employees whole when a consolidation is approved by the Commission. As demonstrated above, the Commission's opinion and order of April 7, 1948 are completely in accord with that Congressional intent and with all the provisions of Section 5(2)(f) of the Interstate Commerce Act.

While the appellant admits that the order of the Commission complies with the basic requirements of Section 5(2)(f), it asks this Court to find that the order is invalid because the Commission failed to go further and provide a protective period *for each* employee to continue for a period of *four years after the date when he is affected by the transaction*. Appellant contends that this is necessary to provide a "fair and equitable arrangement for employee protection" because, as it alleges, the Commission's order will operate to deny all protection to those employees who will be adversely affected.

The record in this case shows that some 1022 employees will be affected by the transaction, representing the total number of employees of all the railroads involved whose work will be taken over by the Union Passenger Terminal. It is estimated that about 680 employees will be required by the Union Passenger Terminal, to be recruited from the 1022 employees as far as possible, leaving some 340 who would be completely displaced. Of these nine are bridge-tenders and 108 are crossing watchmen. (R. 27).

The Commission's order has now placed all 1022 employees in New Orleans on notice that they will be affected, and that some 340 jobs will ultimately be completely eliminated. The order also assures them a four year period (except for employees with shorter periods of prior service) from the effective date of this notice in which to arrange their affairs in the light of the approved transaction and its anticipated effect on them. During this four year period they must be made whole through protection against economic loss in their employment because of the transaction. This is certainly fair and equitable to the employees and is in accord with the standards fixed by Congress.

As has been shown above, the present provisions of Section 5(2) of the Interstate Commerce Act were enacted as a part of the program to improve the position of the railroads. Its provisions were intended to make it feasible for

railroads to consolidate and merge their properties for more economic operations. Congress, however, desired to prevent such transactions from being unduly burdensome on employees and to avoid the sudden impact of unemployment that might result. It therefore required arrangements to be made for the protection of the employees for a four year period after the effective date of the approval. This was the period which Congress determined was fair and equitable to all the parties; both the railroads and the employees. The provisions of Section 5(2)(f) requiring a fair and equitable arrangement clearly contemplate that the arrangement must be fair and equitable to both railroads and their employees.

But the appellant asks that this Court in effect direct the Commission to modify its order in such a way that it will become unfair and inequitable to the railroads, and also be contrary to the provisions of Section 5(2)(f).

As has been shown, the Commission has held in this case that Section 5(2)(f) limits the period of protection to four years after the date of the Commission's order. Appellant has asked, however, that the four year protective period not start until the individual employee is adversely affected. This would violate the statute in two ways. First, it would fail to comply with the mandate that the order must provide that the protection start with the effective date of the order; and second, it does not comply with the mandate that the conditions shall not provide protection to any employee for periods in excess of his service prior to the effective date of the order. To omit these provisions from the protective conditions would result in denying the railroads the fair and equitable arrangement assured them by Congress, keeping in mind that the essential purpose of the Transportation Act of 1940, of which Section 5(2)(f) was a part, was to give relief to the hard-pressed railroads.

Instead of giving all employees the uniform four-year notice and protection, appellant's suggested modification would provide varying periods of protection. In some

cases, the period would extend to 8 or 9 or perhaps more years after the date of approval of the transaction. To illustrate, some employees might not be displaced until some months after the consolidation takes place. It has been shown that the passenger terminal will not be ready for operation for four or five years and that only a few of the employees will be displaced or dismissed prior thereto. So, in such cases it will be seen that the period of protection afforded by appellant's proposal would run up to 8 or 9 years. Such results are manifestly unfair and inequitable and would defeat the purpose of Congress in enacting the present provisions of Section 5(2) of the Interstate Commerce Act.

The fallacy in appellant's argument on this branch of the case lies in its assumption that a provision for the protection of employees is not fair or equitable unless it gives them four years of dismissal pay. This overlooks the fact that an employee is fully protected when he is employed at full pay for four years after the Commission has approved a transaction under Section 5(2), and when the employee accordingly knows that ultimately there will be an adverse effect on employment. Certainly there is nothing unfair or inequitable about giving an employee four years of employment at full pay as a "looking around" period during which he may make provision against the adverse situation which he has been put on notice is coming.

An examination of the record thus shows that the Commission's report and order of April 7, 1948 does comply with all the provisions of Section 5(2)(f) and provides a fair and equitable arrangement with regard to employees who will be adversely affected by the transaction. On the other hand, the modification suggested by appellant would not only be contrary to the law, but would fail to provide a fair and equitable arrangement in fact, as well as under the tests laid down by Congress as statutory limitations on the Commission's powers in fixing fair and reasonable limits for protection.

CONCLUSION.

For all the reasons and upon the authorities above set out, we respectfully submit that the order of the court below granting the defendants' motions for summary judgment and dismissing the complaint because the Commission's report and order of April 7, 1948 are in complete accord with the provisions of Section 5(2)(f) of the Interstate Commerce Act, and provide a fair and equitable arrangement for the protection of employees as intended by Congress under Section 5(2) of the Act, should be affirmed.

Respectfully submitted,

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APPENDIX A.

Section 5(2) of the Interstate Commerce Act.

(54 Stat. L. 905, 49 U. S. C. § 5(2))

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifi-

cations as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will

result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.